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In the Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), which preempts "any" state laws "relating to rates, routes, or services of any air carrier," preempts state regulation of the content and format of air fare advertisements.

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INTEREST OF THE UNITED STATES

Under the Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, the Department of Transportation has authority to regulate certain aspects of the airline industry. In particular, Section 411(a) of the Act, 49 U.S.C. 1381(a), empowers the agency to take administrative action against unfair or deceptive practices in the airline industry. DOT has frequently exercised that authority with respect to allegedly deceptive air fare advertising, attempting simultaneously to protect the public from deceptive practices and to foster price competition among air carriers.

This case presents the question whether detailed state controls on the content and format of air fare advertising are preempted by Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1). The answer to that question is of considerable importance

to DOT. DOT is concerned that conflicting and overlapping state regulation of air fare advertising could interfere with the congressionally mandated goal of fostering competition in air transportation. DOT's policy with respect to air fare advertising, as reflected in a number of enforcement orders, is in conflict with some of the state standards at issue in this case.

In response to an order by this Court inviting the Solicitor General to express the views of the United States, we filed a brief in connection with the petitions in this case and in No. 90-1606.

STATEMENT

The district court entered an injunction prohibiting petitioner from enforcing detailed state restrictions on the form and content of air fare advertising. The court of appeals upheld the injunction, holding that the contemplated state regulation was preempted by Section 105(a)(1) of the Airline Deregulation Act of 1978 [the Deregulation Act], 49 U.S.C. App. 1305(a)(1). That statute provides, with an exception not relevant here, that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of" interstate and foreign air carriers.

1. The United States Department of Transportation has statutory authority to take administrative action against allegedly deceptive practices, including those involving advertising. Under Section 411(a) of the Federal Aviation Act, 49 U.S.C. App. 1381(a), DOT is empowered, "if it considers that such action by it would be in the interest of the public," to "investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."[1] In addition to the

[1] Prior to 1985, the Civil Aeronautics Board was responsible for enforcing Section 411. When that agency was abolished, its Section 411 authority was transferred to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 7(a), 98 Stat. 1706.

cease and desist orders authorized by that Section, DOT has authority to assess civil penalties. 49 U.S.C. App. 1471(a), 1475.

Congress has required DOT to exercise its regulatory powers, including its authority to address deceptive practices, in accordance with specified criteria. 49 U.S.C. App. 1302(a). Those criteria require DOT to give due consideration to the goals, among others, of eliminating unfair or deceptive practices and encouraging "an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." 49 U.S.C. App. 1302(a)(3), (4), (7) and (9).

Since 1985, DOT has issued more than 60 cease and desist orders under Section 411 and has assessed civil penalties totalling more than $1.8 million. Nine of the orders, and more than $265,000 of the civil penalties, have involved unfair or deceptive airline fare advertising.[2] DOT has issued a proposed regulation that would codify certain aspects of its policy, as reflected in a number of enforcement orders, regarding such advertising. 54 Fed. Reg. 31,052 (1989).

2. a. The National Association of Attorneys General (NAAG) is a voluntary association, comprised of representatives of the attorneys general of the 50 States, various territories, and the District of Columbia. In

[2] *E.g.*, *American Airlines, Inc.*, DOT Order No. 91-9-45 (Sept. 20, 1991); *Continental Airlines, Inc.*, DOT Order No. 90-3-8 (Mar. 6, 1990); *Trans World Airlines, Inc.*, DOT Order No. 89-7-15 (July 13, 1989); *Pan American World Airways, Inc.*, DOT Order No. 89-4-25 (Apr. 11, 1989). Order No. 89-7-15 was a consent order assessing a $20,000 penalty for the advertisement discussed at pages 23-24 of petitioner's brief. In other cases, airlines have modified advertisements in response to warnings by DOT, or DOT's Consumer Affairs Office has resolved consumer complaints in situations where enforcement action would not have been appropriate.

1987, a NAAG task force undertook a study of advertising and marketing practices in the airline industry, giving particular attention to airline advertising, frequent flyer programs, and compensation for denied boarding. Pet. App. 36a-37a. Based upon that study, in December 1987, NAAG adopted Air Travel Industry Enforcement Guidelines. See National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (Apr. 1988) [*NAAG Guidelines* or *Guidelines*].[3] The *NAAG Guidelines* include detailed standards regarding, among other things, the content and format of advertising by airlines.[4]

The *Guidelines* provide that any print, broadcast, or billboard advertisement which "provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive." U.S. Br. App. 18a; see *id.* at 12a. For each form of advertising, the *NAAG Guidelines* specify what disclosures must be made to render an advertisement "non-deceptive," the format that must be followed to assure a "clear and conspicuous" presentation, and the content of certain disclosures. *Id.* at 13a-14a, 18a-28a. In the case of printed advertisements, the *Guidelines* prescribe disclosure in type of a certain size, depending on the size of the advertisement, *id.* at 13a; set forth a detailed list of restrictions that must be stated when applicable, *id.* at 18a-19a, 24a-25a; and provide examples of wording that is sufficient or insufficient to convey those restrictions, *id.* at 19a-20a, 24a-25a. Comparable standards are established for broadcast and billboard advertisements. *Id.* at 13a-14a, 21a-24a.

The *NAAG Guidelines* also specify the manner in which advertised fares themselves must be presented. The "total advertised price" must include any fuel, tax,

[3] The guidelines were reproduced as Appendix B to the brief we filed in connection with the petitions for certiorari in this case and in No. 90-1606 [hereinafter U.S. Br. App.].

[4] The *NAAG Guidelines* also contain detailed requirements for frequent flyer programs, as well as for offers of compensation to persons for voluntarily denied boarding. U.S. Br. App. 28a-41a.

or other surcharge. U.S. Br. App. 26a. If the advertised one-way price is available only as part of a round-trip purchase, "this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare." *Id.* at 26a-27a. Finally, certain restrictions must be observed on use of the words "sale," "discount," "reduced," or similar terms. *Id.* at 27a.

The *NAAG Guidelines* disclaim any intention to "create any new laws or regulations regarding the advertising practices or other business practices of the airline industry." U.S. Br. App. 11a. They purport instead to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Ibid.*

b. Both DOT and the Federal Trade Commission opposed the *NAAG Guidelines*.[5] In particular, DOT expressed its view that certain *Guidelines* relating to advertising and round trip pricing "are preempted by Federal law." 1988 DOT Letter, at 1. DOT also noted that the *Guidelines* in question would be inconsistent with its enforcement policy. *Ibid.*

Similarly, the FTC opposed the proposed *NAAG Guidelines* on the grounds that they "might result in inconsistent federal and state regulation" and that they "ignore[d] the important question of federal preemption." 1987 FTC Letter, at 2. Referring to Section 105's preemption of state laws "relating to rates, routes, or services," the FTC observed that the *Guidelines* "would appear to regulate rates and services indirectly, or at least have a substantial impact on them." *Ibid.* Because

[5] Letter dated October 1, 1987, to Christopher M. Ames, Deputy Attorney General of California, from Benjamin Berman, Acting Secretary of the FTC [hereinafter 1987 FTC Letter]; Letter dated March 11, 1988, to Mr. Ames, from Emily H. Rock, Secretary of the FTC [hereinafter 1988 FTC letter]; Letter dated March 2, 1988, to petitioner from B. Wayne Vance, General Counsel of the U.S. Department of Transportation [hereinafter 1988 DOT Letter]. These letters were exhibits 2, 9, and 14 to respondents' motion for a temporary restraining order in the district court.

"[t]he Department of Transportation already regulates airline advertising under section 411 of the Federal Aviation Act, [49 U.S.C. App. 1381]," the Commission continued, "the guidelines would impose duplicative and often inconsistent requirements." *Id.* at 3.

The FTC also expressed opposition to the *Guidelines* on their merits. It noted that the *Guidelines* "could have the unintended consequence of substantially inhibiting effective price competition among the airlines," 1987 FTC Letter, at 2, and went on to explain at some length why the sorts of restrictions NAAG was considering would place an undue burden on advertising and tend to discourage discount air fares, *id.* at 3-4. See 1988 FTC Letter, at 5-6 (reiterating those concerns).

3. a. In February 1988, the attorneys general of Texas, Colorado, Kansas, Massachusetts, Missouri, New York, and Wisconsin sent a memorandum to the major airlines in which they expressed the intention to enforce, through state law, provisions of the *NAAG Guidelines* requiring advertisements to include all fees in the stated fare for a given flight. J.A. 123a-125a. In November of the same year, petitioner, the Attorney General of Texas, sent "notice of intent to sue" letters—on behalf of Texas, California, Massachusetts, New York, and Washington—to respondents Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental), and British Airways PLC (British Air). J.A. 60a-63a, 76a-79a, 97a-100a. The letters charged that certain of those airlines' advertisements were deficient in failing to include fuel, tax, or other surcharges in the advertised fares. *Ibid.* Respondents were told that if they continued to engage in such practices after December 1, 1988, they would "be subject to being sued without further notice or opportunity to cure." *Ibid.* Finally, while noting that DOT allowed separate presentation of certain charges for air transportation, petitioner warned that compliance with DOT standards would not foreclose prosecution. *Ibid.*

b. In January 1989, respondents TWA, Continental, and British Air commenced this action against petitioner.

J.A. iiia; see J.A. 1a-32a.[6] The complaint alleged, *inter alia*, that Section 105(a)(1) of the Deregulation Act preempts enforcement of the *NAAG Guidelines* through the Texas Deceptive Trade Practices Consumer Protection Act, Tex. Bus. & Comm. Code Ann. §§ 17.41 *et seq.* (Vernon 1987). J.A. 10a. Respondents sought a declaratory judgment to that effect, along with preliminary and permanent injunctive relief.

The district court entered a preliminary injunction, finding that respondents were likely to prevail on their contention that "state regulation of advertising of [respondents'] rates, routes, and services has been preempted by the Federal Government" and that "the threatened enforcement action by [petitioner] and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution." Pet. App. 49a. In a subsequent order, the court extended its preliminary injunction to 33 other States. *Id.* at 60a-63a.

c. The court of appeals affirmed. Pet. App. 13a-47a. The court upheld the district court's determination that respondents were likely to prevail on their preemption claim, concluding that "state laws proscribing deceptive advertising are preempted by [Section 105(a)(1) of the Deregulation Act] when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines." *Id.* at 25a. With respect to the language of the statute, the court noted that "a law relates to a particular subject 'if it has a connection with or reference to' that subject." *Id.* at 33a (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)). Here, the court continued, because "[i]t cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1)," "such state action is expressly preempted by" that section. Pet. App. 33a.

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[6] The remaining airlines-respondents intervened in this case at a later point. Pet. App. 16a.

The court of appeals found further support for that conclusion in "the history of federal legislation regulating airlines." Pet. App. 31a. When authority to regulate deceptive practices was transferred from the CAB to DOT, the court found, "Congress intended to retain in the federal government * * * exclusive authority over airline advertising of fares." *Id.* at 33a. The court also rejected petitioner's contention that the Federal Aviation Act's general savings provision, 49 U.S.C. App. 1506, protects state regulation of air fare advertisements from preemption, finding that that provision "does not preserve state law remedies when there is express preemption under § 1305." Pet. App. 33a. This Court denied certiorari. 111 S. Ct. 307, 308 (1990).

4. On remand, the district court entered a final injunction, ruling that Section 105(a)(1) of the Airline Deregulation Act of 1978 preempts direct state regulation of air fare advertisements. Pet. App. 8a-12a. The court of appeals affirmed on the basis of its earlier opinion. *Id.* at 1a-7a.[7]

INTRODUCTION AND SUMMARY OF ARGUMENT

Between 1938 and 1978, the federal government exercised comprehensive regulatory control over the interstate and foreign air carrier industry. Under the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 980, and the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, the CAB regulated entry into the industry, and airlines were required to obtain CAB approval of fares and routes. Looking back at this regime in the mid-1970s, Congress adjudged it an anticompetitive failure. See S. Rep. No. 631, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1-3 (1978). Not a single new trunk air carrier had been permitted to institute

[7] Two petitions seeking review of this judgment were filed—one by Texas and the other by the other 33 States bound by the injunction. This Court granted Texas's petition, which presents only the question whether Section 105 of the Deregulation Act preempts enforcement of the *NAAG Guidelines* through Texas's consumer protection statute.

service, carrier management was largely barred from competing on price, and capacity agreements among airlines allowed them to set the amount of service in various markets. *Ibid.*

With the enactment of the Airline Deregulation Act of 1978, Congress sought to promote a competitive market in the industry. "[T]his new, comprehensive legislation * * * entirely overhaul[ed] the aviation regulatory system." H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978). It removed barriers to entry, phased out regulation of rates, and did away with other restrictions on potential competition. The Act also directed federal regulators to exercise their remaining authority in a manner promoting competition. 49 U.S.C. App. 1302(a)(4) and (9). The Act's ambitious objective was "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services[.]" H.R. Conf. Rep. No. 1779, *supra*, at 53.

One provision of the statute expressly preempts state laws "relating to" the three basic areas in which airlines compete. Section 105(a)(1) of the Act, 49 U.S.C. App. 1305(a)(1), provides, with an exception not relevant here, that

> no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The fundamental dispute in this case concerns the role that Congress intended the preemption provision to play in opening the airline industry to competition. Petitioner argues that Section 105(a)(1) was designed only to prevent States from reimposing the same kinds of regulatory controls that the Deregulation Act abolished. In his view, "Congress intended to take the federal government out of the business of the economic, utility-like

regulation of the rates, routes, and services of carriers providing air transportation and, at the same time, intended to see that states did not merely step in, and by re-regulating, undo what Congress had just done."[8]

The statute does not say that. The language of Section 105(a)(1) preempts "*any* law * * * *relating to*" rates, routes, or services" (emphasis added). Congress chose not to limit preemption to state regulation "of" rates, routes, and services; Section 105(a)(1) extends to state laws "relating to" those subjects. That formulation is strikingly similar to the language of ERISA's preemption provision, 29 U.S.C. 1144(a). In construing ERISA, this Court has made clear that a law relates to a benefit plan if the law has a connection with or reference to the plan—whether or not the law was designed to affect the plan or ostensibly regulates some other matter. Section 105(a)(1) should be given the same common-sense meaning. In fact, several features of the statutory text—the reference to "any" state law, the fact that preemption extends to legal proscriptions that are not characteristic of "utility-type" regulation, and an exemption within Section 105 preserving the proprietary powers exercised by airport owners—establish that Section 105(a)(1) is not limited to direct regulation of rates, routes, and services.

The detailed state law controls on air fare advertising that petitioner has threatened to enforce "relate to" rates within the meaning of Section 105(a)(1). On their face, the *NAAG Guidelines* refer specifically to air fares. More fundamentally, advertising is the quintessential means by which airlines and other sellers communicate

[8] Pet. Br. 10. Accord 31 States Br. 5 (intent of Section 105(a)(1) was "to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified air transportation services"); Public Citizen Br. 7 ("Having decided to replace this public utility-style of regulation with marketplace competition, Congress also decided that it would make no sense to leave room for similar regulation at the state or local level by allowing the states to impose their own views as to what was a reasonable fare or how many airlines should serve a particular route.").

their prices to potential buyers. Especially in light of the complex fare structures that characterize the airline industry, controls on advertising have a direct impact on the market mechanisms that establish rates for air transportation. Enforcement of the *NAAG Guidelines* would burden advertising of discount fares, and thereby threaten the fares themselves.

The *NAAG Guidelines* also interfere with the implementation of pro-competitive regulatory policies set forth in the Deregulation Act. When it enacted that statute, Congress did not just withdraw direct federal controls over rates, routes, and services. It also set out new regulatory criteria requiring federal authorities to exercise their remaining authority in a manner promoting competition and protecting consumers from deception. 49 U.S.C. App. 1302(a). DOT has applied those criteria in fashioning an approach to air fare advertising that is inconsistent, in various respects, with the *NAAG Guidelines*. Section 105(a)(1) is properly construed to make room for the pro-competitive regulatory judgments that Congress mandated as well as to foreclose direct state controls on rates, routes, or services.

ARGUMENT

SECTION 105(a)(1) OF THE AIRLINE DEREGULATION ACT PREEMPTS STATE REGULATION OF THE CONTENT AND FORMAT OF AIR FARE ADVERTISING

A. Section 105(a)(1) Extends To State Laws "Relating To" Rates, Routes, and Services, Not Just To Direct Regulation Of Those Matters

In this case, Congress has expressly preempted a defined category of state laws. Accordingly, as in any other case presenting a question of statutory interpretation, it is appropriate to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407

(1990) (quoting *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)).[9]

1. The language of Section 105(a)(1) is "conspicuous for its breadth,"[10] and "[t]he key to" that provision "is found in the words 'relat[ing] to.'"[11] Congress chose to preclude not only state regulation "of" airline rates, routes, and services; instead, it used the broader phrase "relating to."

In that respect, Section 105(a)(1) is very similar to another preemption statute enacted four years earlier, Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a). In general, Section 514(a) preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan" within the scope of ERISA. This Court has recognized that a state law "relates to" a benefit plan, for purposes of this provision, "if it has a connection with or reference to" the plan, *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 96-97.[12] Preemption is not limited to "state laws specifically designed to affect employee benefit plans." *FMC Corp.* v. *Holliday*, 111 S. Ct. at 408; see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98. "[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981), and a law is not immune from preemption simply because it "ostensibly regulat[es] a matter quite different from pension plans," *id.* at 524.

[9] Amici Public Citizen and Aviation Consumer Action Project invoke a "presumption" against preemption (Public Citizen Br. 13), but the presumption is plainly overcome by the express preemption provision. The issue is then one of interpreting the statutory provision; the presumption does not resurface at every turn once it has been overcome. See, *e.g.*, *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990) (acknowledging presumption against waiver of sovereign immunity, but then applying normal rules of statutory construction to interpret express waiver).

[10] *FMC Corp.* v. *Holliday*, 111 S. Ct. at 407 (referring to comparable language in ERISA).

[11] *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990) (referring to ERISA).

[12] See *Black's Law Dictionary* 1158 (5th ed. 1979) ("Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.").

Our basic submission is that the phrase "relating to" in Section 105(a)(1) of the Deregulation Act should be given the same "broad common-sense meaning" as the comparable phrase in ERISA. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. at 739. Nothing in the language of Section 105(a)(1) limits that provision to direct regulatory controls of the type that other provisions of the Deregulation Act withdrew—or to some amorphous category of "utility-type" regulation. That is clear not just from the phrase "relating to," but also from other features of the statutory text.

First, Section 105(a)(1) extends to "any" state law, without referring to any functional subcategory of those laws. Indeed, the preemption provision is not limited to the types of legal provisions that are characteristic of "utility-type" regulation. Typically, regulation of that sort is conducted by individual States pursuant to statutory authority. In Section 105(a)(1), Congress took care to preclude a variety of other forms of state action—including standards adopted by more than one State "having the force and effect of law." Like the phrase "relating to", that part of Section 105(a)(1) parallels the ERISA preemption provision. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482-483; 29 U.S.C. 1144(c)(1).

Second, Section 105(b) of the Deregulation Act, 49 U.S.C. App. 1305(b), preserves from preemption the authority of a state "owner or operator of an airport * * * to exercise its propriety powers and rights." The "proprietary powers and rights" of an airport owner—which are limited by federal law and involve such matters as airport noise and congestion—do not include utility-type regulation of the rates, routes, and services

of airlines serving public airports.[13] It is clear, therefore, that Congress must have intended the phrase "relating to rates, routes, or services" to reach beyond the kind of regulatory authority that the Deregulation Act withdrew from the CAB. If Section 105(a)(1) were as narrow as petitioner suggests, there would have been no need for the exemption.[14]

Finally, Section 105(c) of the Act, 49 U.S.C. App. 1305(c), includes an express reference to direct state regulation of rates, routes, and services. That subsection mandates particular treatment for air carriers "operating primarily in intrastate air transportation regulated by a State." Thus, when Congress wished to refer specifically to direct regulation of air transportation by the States, it knew how to do so. All of these features of the statutory language undercut petitioner's contention that Congress intended Section 105(a)(1) to foreclose only direct controls on rates, routes, and services.[15]

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[13] See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *British Airways Bd.* v. *Port Authority of New York*, 558 F.2d 75, on reh'g en banc, 564 F.2d 1002 (2d Cir. 1977); *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

[14] There is a "well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981). In keeping with that principle, the Court is very reluctant to adopt an interpretation of general statutory language that would render an express exemption unnecessary. For instance, in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 9-10 (1989), this Court found that a provision exempting States from certain Superfund liability constituted "an explicit recognition of the potential liability of States under this statute," since "Congress need not exempt States from liability unless they would otherwise be liable." See *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. at 98.

[15] In arguing the contrary view, petitioner places heavy reliance on the legislative history of Section 105(a)(1). *E.g.*, Pet. Br. 16-19. In our view, however, the legislative history is of limited value in the context of this case. Because there had been very little price competition among carriers prior to 1978, it is hardly surprising that regulation of air fare advertising received no mention in the committee reports—or that specific references to state regulation involved direct controls on rates, routes, or services. The fact that prior experience with conflicts between state and federal regulation involved that type of state action does not establish that Congress intended the broad language it employed in the statute to have a more restricted meaning. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990) ("the language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history").

2. There is no merit to petitioner's contention that Section 1106 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1506, warrants such a limitation on Section 105(a)(1). That provision, which was first enacted in 1938 and received no attention in connection with the enactment of the Deregulation Act, provides that "[n]othing contained in this chapter [49 U.S.C. App. 1301-1557] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." In *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), this

In fact, the legislative history indicates otherwise. The Senate version of the preemption provision would have foreclosed not only laws "establish[ing] any standard determining routes, schedules, or rates, fares, or charges in tariffs of" an air carrier, but also laws "otherwise promulgat[ing] economic regulations" for air carriers. S. 2493, 95th Cong., 2d Sess., § 17 (1978) (quoted in S. Rep. No. 631, *supra*, at 39). The House's version, which was ultimately enacted, combined both types of state laws into a single category of laws "*relating to* rates, routes, or services," H.R. 12,611, 95th Cong., 2d Sess., § 105(a) (1978) (emphasis added) (quoted in H.R. Rep. No. 1211, *supra*, at 40). That category thus goes well beyond laws "determining" rates, routes, or services. Statements in the committee reports regarding the purpose of Section 105(a)(1) also suggest that it was not limited to direct controls; Congress sought to avoid "a confusing system of dual regulation" and granted "sole responsibility" for regulating interstate carriers to the CAB, S. Rep. No. 631, *supra*, at 98; see H.R. Rep. No. 1211, *supra*, at 15-16.

That same theme was repeated six years later when Congress transferred the CAB's authority over deceptive practices to DOT. The committee report accompanying that legislation reiterated Congress's concern that both federal regulation and state preemption were needed to avoid imposing overlapping and conflicting standards on air carriers. See H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984).

Court held that Section 1106 preserved a common law damages action by a passenger who had been "bumped" from a flight for which he had a reservation. The Court found that there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." 426 U.S. at 299.

After the enactment of Section 105(a)(1), that is no longer true with respect to efforts by states to enact or enforce laws "relating to rates, routes, or services." Unless Section 105(a)(1) is to be limited to laws without remedies, it must be held to supersede some of the remedies that would otherwise have been preserved by Section 1106. Thus, Section 1106 is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including Section 105(a)(1)'s express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-130 (1915).[16]

3. We do not suggest, of course, that all state laws having any theoretical connection with an air carrier's rates, routes, or services are preempted. In determining what state laws "relate to" pension plans within the meaning of ERISA, this Court has referred to "the structure and purpose of the statute," *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482, "the purposes of the preemption provision, and the regulatory focus of ERISA as a whole," *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19

[16] The Court has often construed general savings clauses so as not to undercut the remainder of a statute. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause"); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986) (giving narrow reading to savings clause to preserve uniformity of maritime law); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-329 & n.16 (1981) (noting that preemption clause could narrow previously-enacted savings clause); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (observing, with respect to a savings clause, that "the act cannot be held to destroy itself").

(1987). In particular, the Court has examined whether a state law "risk[s] subjecting plan administrators to conflicting state regulations," *FMC Corp.* v. *Holliday*, 111 S. Ct. at 408, or to the "prospect of conflict" with federal law, *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. at 19. There is no reason why Section 105(a)(1) cannot be applied with the same sensitivity to its role in the Deregulation Act. An artificially narrow interpretation is not necessary to preserve state laws prohibiting "gambling, prostitution, or the sale of illegal drugs * * * by an airline," tort actions arising from plane crashes, or the like. Pet. Br. 13; accord Public Citizen Br. 9-11. Unlike state laws regarding air fare advertising, those state laws do not relate to rates, routes, or services in a manner implicating competition or the pro-competitive policies of the Deregulation Act.

B. The *NAAG Guidelines*' Detailed Controls On The Form And Content Of Air Fare Advertising "Relate To" Rates Within The Meaning Of Section 105(a)(1)

As noted, a state law "relates to" rates, routes, or services if it has a "connection with or reference to" those matters. A state law incorporating the *NAAG Guidelines* has the requisite relationship with rates charged by air carriers, and that relationship is one that implicates the pro-competitive objectives of the Deregulation Act. The *Guidelines* refer expressly to rates charged by air carriers; in fact, they are limited to advertising of rates in that one industry.[17] More fundamentally, regulation of air fare advertising has a direct connection with the market mechanism through which rates are set in the deregulated airline industry, as well

[17] In the context of ERISA, this Court has made clear that "state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans" for purposes of that statute. *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988). There is no merit, therefore, to petitioner's suggestion that enforcement of the *Guidelines* through state law involves only the application of general consumer protection laws having no particular focus on airlines or their rates, routes, and services.

as with the pro-competitive regulatory policies mandated by the Deregulation Act. Consequently, preemption is entirely consistent with the structure, purpose, and regulatory focus of the Deregulation Act. As the Seventh Circuit recognized, "[p]rice advertising surely 'relates to' price," *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d 751, 754 (1989).

1. *State Controls on the Form and Content of Air Fare Advertising Have a Connection With Price Competition in the Airline Industry*

Advertising is the quintessential means by which competitive sellers of air transportation communicate their prices to potential buyers. This Court has recognized that advertising restrictions "serve[] to increase the [consumers'] difficulty of discovering the lowest cost seller of acceptable ability," which leaves sellers "isolated from competition" and reduces "the incentive to price competitively," *Bates* v. *State Bar*, 433 U.S. 350, 377 (1977). Studies in other fields have confirmed that consumers pay higher prices when advertising is restricted. See Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 Am. Econ. Rev. 211 (1984); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976). Advertising plays a particularly important role in fostering price competition in the airline industry.

a. The economics of the airline industry tend to produce a complex fare structure. A large share of air carriers' costs are joint and common, not directly attributable to any one service or class of passengers. The marginal cost of providing additional service is often low. Most airlines operate with substantial excess capacity overall but face heavy demand for some flights. Air travel is highly seasonal and cyclical. Airlines have some customers (typically traveling on business) who are relatively price-insensitive but who need to be able to fly at particular times and on short notice; other customers (frequently tourists) are price-sensitive but have less stringent demands in terms of flight schedules and

advance notice. A rational response to these conditions is to set fares for relatively price-insensitive customers that are high enough to recover the airlines' joint and common costs, while at the same time using lower fares (in excess of marginal cost) to attract price-sensitive customers to fill seats that would otherwise be empty. See Transportation Research Board National Research Council, *Winds of Change: Domestic Air Transport Since Deregulation* 93-95 (1991) [hereinafter *Winds of Change*].

The Congress that enacted the Deregulation Act was especially dissatisfied with the CAB's failure to allow airlines to establish rates responsive to those economic considerations. See S. Rep. No. 631, *supra*, at 3, 101-106; H.R. Rep. No. 1211, *supra*, at 9. For most of the period prior to 1978, the CAB generally required air carriers to compute fares on the basis of the length of a flight, recognized only a few classes of service, and discouraged experimentation with lower rates. This element of the regulatory scheme was a "focus" of criticism. S. Rep. No. 631, *supra*, at 3. Congress found that the CAB's approach—"when coupled with restricted entry—seriously inhibits price competition among airlines and, as a result, many CAB formula fares are dramatically higher than they would be under a fundamentally less regulated structure." S. Rep. No. 631, *supra*, at 102-103.

The absence of discount fares attracted particular attention. Congress noted that the CAB's approach "may injure the public by encouraging carriers to provide uniform fare and service offerings other than by discounts even though consumer demand in many markets might result in innovative offerings to meet the needs of those particular markets." S. Rep. No. 631, *supra*, at 102. The Senate Committee Report described low fares available on routes not subject to federal regulation, *id.* at 103-104, and criticized federal regulatory policy that had discouraged similar discounts on interstate routes, *id.* at 104-105. To promote price competition and discounts, the Deregulation Act removed substantive and procedural

barriers to reduced fares. See 49 U.S.C. App. 1482(d)-(e); S. Rep. No. 631, *supra*, at 106-110. These provisions have had their intended effect. Currently, domestic carriers are free to set their own fares without government supervision, and some 90% of all air travelers use discount fares.[18]

Fare structures have also become far more complex. See *Winds of Change* 94. Indeed, airlines now have access to sophisticated computer programs—known as revenue management systems—that allow them to "fine tune" the prices at which they sell seats on every flight. In a recent comprehensive study of the domestic airline industry, DOT found that revenue management systems are "pro-competitive." 1 U.S. Department of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Pricing* 188-189 (Feb. 1990).

Restrictions on low-priced fares are a necessary aspect of the industry's complex fare schedules. Part of an airline's motivation for offering a reduced fare is to obtain passengers who are committed to flying at a time when the airline would have difficulty selling a full-fare ticket. It would be impossible to persuade passengers to pay different amounts for seats on the same flight if all tickets were issued without restrictions. Consequently, airlines impose restrictions on the lower-priced tickets that enhance their usefulness to the airlines, but make them less attractive or even unavailable to customers desiring to fly on short notice and with an unrestricted schedule. See *Winds of Change* 94-95.

b. Advertising plays a critical role in a market characterized by discounts and restrictions. If airlines are to employ low fares to compete for potential customers, they must be allowed to communicate the availability of the fares. Indeed, an airline's incentive to offer a discount is no greater than its confidence that the discount will become known in the marketplace. A discount makes economic sense only if it produces enough additional travellers to compensate for the reduction in the price charged to each one.[19] Advertising, in turn, contributes to price competition to the degree—no more and no less—that it is cost-effective and accessible to consumers.

[18] *Economic Report of the President* 203 (1988); Bureau of Economics of the Federal Trade Commission, *The Deregulated Airline Industry: A Review of the Evidence* 1, 6 (Jan. 1988); 1988 FTC Letter, at 1.

The *Guidelines* provisions that led to the filing of this lawsuit have a tendency to impair pro-competitive advertising common in this industry. By way of illustration only, it is a common practice in the industry for so-called "consolidators" to obtain blocks of seats at a substantial discount from airlines whose experience tells them those seats would otherwise remain unsold. The consolidators can (and to survive, must) make the availability of their low fares known to consumers while incurring the smallest possible advertising expense. When they are successful, they serve as an important source of particularly low fares and as a competitive spur to airlines themselves.

To publicize their prices, consolidators often employ "grid" advertisements showing fares to a number of destinations. These advertisements present a great many price and service options to a wide range of destinations in a small (and relatively inexpensive) space.[20] With the information provided in a single advertisement, consumers are able to determine the fare for a round-trip to and from a single destination and, often, to calculate the fares for an "open jaw" trip (a trip in which the traveller takes different routes outward and homeward bound).

[19] 1988 FTC Letter, at 5.

[20] These advertisements are very common. See, *e.g.*, New York Times Travel Section, Feb. 9, 1992, at 23, 26, 28-29, 31. Grid advertisements customarily list ½ round trip fares for as many as 50 foreign destinations. Notes to the fares indicate that varying amounts of taxes, one-way surcharges, restrictions, weekend surcharges, and other terms may apply to particular flights.

Advertisements taking this form cannot be brought into compliance with the *NAAG Guidelines*. First, in order to present information regarding both round trips and open jaw trips in a single advertisement, such advertisements often show the relevant "1/2 Round-Trip Fares" and instruct potential purchasers that an additional sum will be charged for a one-way fare. The *NAAG Guidelines* prohibit use of 1/2 round trip fares, as well as separately itemized surcharges. U.S. Br. App. 26a-27a. Second, although the fees applicable to trips to and from various foreign destinations are relatively small (typically between $10 and $20 each way), the amount of the fees often varies depending on which direction a flight is going. If one-way fares for open jaw travellers must show the total price of each ticket, as the *NAAG Guidelines* require, *id.* at 26a, two prices would be necessary for each overseas destination.[21] Third, although the advertisements disclose that restrictions may apply for particular flights and advise potential customers to call for details, they do not purport to itemize all of the terms and conditions attached to each of the flights referred to in a given advertisement. Under the *NAAG Guidelines*, as many as 10 types of restrictions must be specifically set

[21] As DOT has explained in the preamble to its proposed regulation on this subject, charges that it allows to be unbundled "are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to [publish] advertisements with one way and round-trip fares to multiple destinations and include the charges in single advertised rates." 54 Fed. Reg. 31,053 (1989).

The problem is not limited to foreign trips. U.S. airports are now allowed to assess passenger facility charges—a maximum of $3 per airport, up to a total of $12 per trip, to be collected by air carriers. 56 Fed. Reg. 24,254 (1991). Thus, the total price of a ticket may vary by up to $12 depending on the embarkation, disembarkation, and connecting airports used by a traveller. If the additional charges had to be included in the total advertised air fare, as the *NAAG Guidelines* require, a number of fares might have to be listed in an air fare advertisement for just one city-pair market (*e.g.*, Washington to Los Angeles), since the total price might vary depending on whether various alternative flights are direct and, if not, which airports are used for connecting flights.

forth in any print advertisement for a given fare. *Id.* at 18a-19a.[22] It is impossible to fit those disclosures into the small, economical advertisements favored by consolidators.

This example is only illustrative. By forcing sellers of air transportation to present fares and restrictions in a particular form with a specified level of detail, the *NAAG Guidelines* restrain the sellers' ability to communicate with the public. In some situations, such as advertisements by consolidators or short radio spots, the restrictions may make advertising altogether impracticable. In others, the *Guidelines* may inhibit the cost-effective presentation of information contributing to price competition in the airline industry. Either way, the *Guidelines* have an effect on—and thus a connection with—price competition that the Deregulation Act was designed to foster.

[22] Under Section 2.1 of the *NAAG Guidelines*, "[p]rint advertisements for fares must make clear and conspicuous disclosure of restrictions such as" (U.S. App. Br. 18a-19a):

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- Time of day or day of week restrictions.
- Length of stay requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- The statement, if any, required by Guideline 2.4
- Any other material restriction on the fare.

Those restrictions must be itemized, furthermore (U.S. Br. App. 19a):

- in the body copy of the advertisement,
- adjacent to the fare price, or
- in a box with a heading such as "Restrictions."

2. *State Controls on the Form and Content of Air Fare Advertising Interfere with the Regulatory Regime that Congress Created to Assure Due Consideration of Consumer Protection and Competition in the Airline Industry*

It is true, of course, that advertising can be misleading and deceptive. But it does not follow, as petitioner asserts (Pet. Br. 11-13) and the *NAAG Guidelines* assume,[23] that full disclosure of the details of all restrictions on air fares invariably promotes competition or benefits consumers. An advertisement that contains a bewildering amount of detail has the potential to confuse, as well as to educate. Moreover, disclosure requirements that increase the cost of advertising can reduce the information available to consumers. As the FTC explained, in opposing the *NAAG Guidelines*:

> Advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Consumers do not rely on advertising of this type to make a final purchase decision, and it does not serve that function. The goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans. Requiring too much information in ads can have the paradoxical effect of stifling the information that consumers receive.

1987 FTC Letter, at 4. Accord 1988 FTC Letter, at 5-6. In short, an undue emphasis on disclosure may actually undercut competition and thereby disadvantage the consumer.

a. The Deregulation Act included a new declaration of policy requiring federal authorities to address issues of this type with a view both to the interests of consumers and to the statutory objective of enhancing competition. When DOT exercises its authority to take action against deceptive practices, 49 U.S.C. App. 1381(a), the Deregulation Act requires it to give specific consideration to, among other things (49 U.S.C. App. 1302(a)(3), (4), (7), and (9)):

> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without * * * unfair or deceptive practices * * *.
>
> (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) encourage efficient and well-managed carriers to earn adequate profits and to attract capital.
>
> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation * * *.
>
> (9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

Those provisions gave the federal government "a clear and firm mandate to regulate in a manner which places primary reliance on competition." S. Rep. No. 631, *supra*, at 52. Indeed, "the policy statement designates a competitive industry as a goal in itself." *Ibid.* Accord H.R. Rep. No. 1211, *supra*, at 5-6. "This new charter [was] intended as a legislative mandate * * * both as to the direction and policy of aviation regulation and also * * * the limits of such policy." H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978). In our view, Section 105(a)(1) was designed to preclude not only state laws reimposing the direct controls on rates, routes, and services that Congress abolished, but also laws relating to those matters that could interfere with the pro-competitive policies that federal authorities were directed by Congress to implement.

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[23] "The essence of the [*NAAG Guidelines*] is that consumers must be advised of the limits which the airlines [*sic*] has chosen to impose on consumers' ability to buy tickets at the advertised price." U.S. Br. App. 21a.

b. Shortly after the enactment of the Deregulation Act, the CAB promulgated a regulation embodying this view of Section 105(a)(1). 14 C.F.R. 399.110. In the main, the regulation tracks the statutory language, but it also provides a non-exhaustive list of examples of regulatory actions that would be deemed preempted.[24] In the explanatory note accompanying the regulation, the Board explained that "it, not the States, is responsible for economic regulation[] of all the routes, rates, or services of any airline" operating under federal authority and that it was "occupying the entire field of economic regulations." 44 Fed. Reg. 9948 (1979). That degree of preemption, the Board continued, was consistent with Section 105's policies of "prevent[ing] State economic regulation from frustrating the benefits of decreased Federal regulation" and "avoid[ing] the confusion caused under existing law which permitted dual State and Federal regulation of the safe carrier." *Id.* at 9949.[25]

Significantly, the Board also made clear its view that preemption was not limited to direct regulation of rates, routes, and services themselves, but also extended to matters as to which the Board would be called upon to balance the concerns of consumers with the Deregulation Act's policy of fostering competition. In explaining why preemption should extend to capital structure, minimum insurance requirements, bonding, and other similar matters, the CAB stated (44 Fed. Reg. 9951 (1979)):

> Such regulations necessarily involve a balancing of such considerations as the need to assure carriers' financial integrity and further other goals of consumer protection, and at the same time, to reduce the barriers to entry and encouraging competition. Such balancing is essential to the success of deregulation and reliance on the free market, and it is specifically within the Board's province.

This understanding of Section 105(a)(1)'s function is entitled to deference. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).[26]

c. DOT's approach to air fare advertising has embodied just this sort of balancing. In keeping with the regulatory criteria established by Congress in 49 U.S.C. App. 1302(a), DOT has fashioned its enforcement policy with the dual objectives of protecting consumers and avoiding undue interference with price competition. For instance, it has long been DOT's policy to permit "the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agricultural inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately." [27]

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[24] The regulation states (14 C.F.R. 399.110(d)):

> Examples of regulatory actions preempted under this section include, but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability insurance, bonding, and capitalization.

[25] The reference to "economic" regulation is not fairly limited to direct controls on routes, rates, or services. At the time this regulation was issued, as now, the anti-deception provision of the Federal Aviation Act, 49 U.S.C. App. 1381, was included in Subchapter IV of the Act, entitled "Air Carrier Economic Regulation."

[26] Petitioner contends that this understanding of the scope of Section 105(a)(1) does not reach state controls on the form and content of air fare advertising. In his view, those controls "do not advance consumer protection at the expense of market competition," but rather "protect consumers by protecting the competitive functioning of the marketplace." Pet. Br. 23. As this case reflects, however, the risk that state laws may undercut pro-competitive federal policy exists even when States conceive of their regulation as advancing competition or protecting consumers. State and federal authorities seeking to advance competition may disagree on how that goal is best served. The result may be overlapping and conflicting standards plainly inconsistent with the statutory preference for a uniform, pro-competitive regulatory policy. See 54 Fed. Reg. 31,054 (1989).

[27] J.A. 43a. DOT first issued an order allowing separate presentation of international departure taxes. J.A. 33a-39a. It then issued

In adopting its policy, DOT was attempting "to allow the industry to advertise its services in a variety of ways and * * * to encourage open price competition," while at the same time "ensur[ing] that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered." J.A. 43a. See J.A. 48a (noting that this policy "[b]alanc[ed] the industry's need to advertise innovatively and competitively against the traveling public's need for accurate price information"). DOT found that a requirement that all charges be combined in an advertisement could interfere with certain types of advertising and lead to confusion. J.A. 42a. The agency also noted that it had received "few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type." J.A. 44a.[28]

d. The *NAAG Guidelines* embody diametrically different conclusions regarding the same type of advertising. States committed to those standards regard advertisements that comply with DOT's policy as offers of "fictitious ticket prices which represent only a portion of the actual airfare one must pay to purchase the advertised

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orders extending the policy to the other items listed in text, J.A. 40a-45a, and clarifying its scope, J.A. 46a-52a. After those orders were struck down because they had been issued without notice and opportunity for comment, *Alaska* v. *Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the Department restated its enforcement policy in consent decrees, see, *e.g.*, Order 89-4-25, at 2 n.1 (Apr. 11, 1989). It also issued a proposed rule codifying that policy. 54 Fed. Reg. 31,052 (1989).

[28] Throughout the period material to this dispute, a very small percentage of the complaints received by the DOT's Office of Consumer Affairs has concerned advertising. U.S. Department of Transportation, Office of Consumer Affairs, *Air Travel Consumer Report* (Jan. 1988) (Complaint Categories) (in 1987, of 44,845 complaints, 411 concerned advertising); U.S. Department of Transportation, Office of Consumer Affairs, *Air Travel Consumer Report* (Feb. 1992) (Complaint Categories) (in 1991, of 7551 complaints, 104 concerned advertising).

ticket" and as "an obvious attempt to deceive or mislead consumers into believing that an advertised airfare is less expensive than it really is." 31 States Br. 6-7.

We believe that Section 105(a)(1) is fairly construed to protect the pro-competitive regulatory judgments mandated by the Deregulation Act's statement of policy from this type of conflict. When it set out to restore competition to the airline industry, Congress both removed direct federal controls on rates, routes, and services and directed that remaining federal authority relating to those matters be exercised so as to advance competition. It would make little sense to construe Section 105(a)(1) to protect only a portion of the pro-competitive regime Congress put in place.

This Court has recognized that ERISA's preemption provision was designed "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 484. The same approach is appropriate in the context of Section 105(a)(1). "In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

* * * * *

The plain language of Section 105(a)(1) preempts state laws "relating to rates." In the economic and regulatory setting established by the Deregulation Act, the *NAAG Guidelines* that petitioner has threatened to enforce through Texas law fall within that category. In a competitive market, controls on the content and form of air fare advertising relate directly to the fares themselves. Those controls also infringe on the area for which Congress prescribed pro-competitive regulatory criteria. Section 105(a)(1) is properly construed to preserve room for the implementation of those criteria, as well as to

preclude direct state regulation of rates, routes, and services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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